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14 *Alberto Buencamino, James Dzurenda,*
15 *Jerry Howell, Jennifer Nash, and Brian Williams*

16 **UNITED STATES DISTRICT COURT**
17 **DISTRICT OF NEVADA**

18 SHANNON CARTER,

19 Plaintiff,

20 v.

21 S. BEAN, BITAR, and J. NASH, *et al.*,

22 Defendants.

23 Case No. 2:17-cv-01628-RFB-EJY

24 **DEFENDANTS' REPLY TO**
25 **PLAINTIFF'S RESPONSE IN**
26 **OPPOSITION TO DEFENDANTS'**
27 **MOTION FOR PARTIAL**
28 **RECONSIDERATION OF ORDER**
29 **GRANTING IN PART, AND DENYING**
30 **IN PART, DEFENDANTS' MOTION**
31 **FOR SUMMARY JUDGMENT**
32 **(ECF NO. 88)**

33 Defendants, Scherrie Bean, Paul Bitar, Alberto Buencamino, James Dzurenda, Jerry
34 Howell, Jennifer Nash, and Brian Williams, by and through counsel, Aaron D. Ford,
35 Attorney General for the State of Nevada, and Amy A. Porray, Deputy Attorney General,
36 hereby submit this Reply to Plaintiff's Response in Opposition to Defendants' Motion For
37 Partial Reconsideration Of Order Granting In Party, And Denying In Part, Defendants'
38 Motion for Summary Judgment (ECF No. 88)

39 **MEMORANDUM OF POINTS AND AUTHORITIES**

40 **I. INTRODUCTION**

41 In Plaintiff, Shannon Carter's Response, he argues that Defendants' Motion should
42 be denied because: (1) it is procedurally improper; and (2) the Court's Order was correct

1 regarding exhaustion under the PLRA. Response at 1-2. Both of Plaintiff's arguments fail,
 2 as Defendants have properly moved this Court for reconsideration as per Local Rule 59-
 3 1(a) and Carter did not exhaust his administrative remedies as required by the PLRA. Both
 4 will be discussed, *supra*. Accordingly, Defendants' Motion should be granted.

5 Defendants hereby incorporate, as fully set forth herein below, their Motion for
 6 Partial Reconsideration of Order Granting in Part, and Denying in Part, Defendants'
 7 Motion for Summary Judgment. Defendants' supplement as follows.

8 **II. LEGAL ARGUMENT**

9 **A. Defendants' Motion is Procedurally Proper**

10 Carter argues that Defendants' Motion is procedurally improper because
 11 Defendants' have "recycle[d] and repeat[ed] the same argument" made in their Motion for
 12 Summary Judgment. Response at 2. Under Local Rule 59-1(a), reconsideration is proper
 13 when a court "has overlooked or misunderstood" certain points of law or fact and/or the
 14 court has committed clear error in its decision. As Defendants detailed extensively in their
 15 Motion for Partial Reconsideration, this Court erred in deciding that Carter had failed to
 16 exhaust his administrative remedies. Further, Carter, himself, gave a detailed opposition
 17 to Defendants' substantive arguments regarding the same. *See* Response at 3-7. Carter's
 18 opposition is not merely "recycle[d] and [repeat[ed]" from his response to Defendants'
 19 arguments regarding exhaustion in their Motion for Summary Judgment. Accordingly, the
 20 instant Motion is not procedurally barred.¹

21 / / /

22

23 ¹ Confusingly, Carter also argues "[a]s a collateral matter", an issue surrounding
 24 Defendants' Notice of appeal regarding qualified immunity. Motion at 2-3. Although
 25 inarticulately stated and raised "collaterally", to the extent that Carter's argument is that
 26 Defendants' Motion is procedurally barred because the failure to exhaust should have been
 27 raised on appeal instead of reconsideration, Carter's argument fails. Defendants' argument
 28 on reconsideration asks this Court to reconsider its decision regarding exhaustion, and
 bases therefore, for which it has erred in rendering. This is properly the subject of
 reconsideration as distinguishable from the appellate review sought of this Court's decision
 regarding qualified immunity.

1 **B. Carter Failed to Exhaust His Administrative Remedies**

2 Carter argues that his May 2, 2016, June 24, 2016 and August 9, 2016, grievances
 3 were sufficient to put Defendants on notice under the PLRA that HDSP staff was “refusing
 4 to treat his dental issues.” Response at 3. The thrust of Carter’s argument is that: (1) he
 5 was not required to file another information grievance after April 6, 2017, because it arose
 6 from the same facts as his “Eighth Amendment claim about which the Defendants were
 7 already on notice”; and (2) he was not required to fully exhaust his grievances because the
 8 “facts of the case” imply that administrative remedies were unavailable to him. Response
 9 at 3-4.

10 Here, this Court made no findings that the grievance process was unavailable to
 11 Carter. In fact, in finding that Carter has exhausted his administrative remedies, it is
 12 inherent in such finding that the administrative process was available to him. Carter does
 13 not dispute that he did not exhaust his remedies. Instead, he contends that “administrative
 14 remedies [were] effectively unavailable” to him. Response at 4. While he claims that he
 15 would have been punished, retaliated against, or further denied treatment had he
 16 exhausted his administrative remedies, such actions are already the foundation of the
 17 instant claim. He also relies on the grievances of May 2, 2016, June 24, 2016, and August
 18 9, 2016, to provide proper notice. It is unclear how he can contend that the administrative
 19 process was available to him at certain times and for certain claims, but not at others.

20 Carter also improperly includes unsworn facts that are not properly before the Court
 21 for reconsideration. He states that “he knew if he kept complaining they would refuse to
 22 treat him, and he would suffer a longer delay in obtaining the help he needed.” Response
 23 at 6. Such unsworn statements are not properly before this Court and should not be
 24 considered in the context of reconsideration.

25 Carter further claims that there is ambiguity regarding the Administrative
 26 Regulations. Response at 6. He argues that AR 740.04(2)(B), which states that it is an abuse
 27 for an inmate to file multiple grievances on the same “specific claim”, is ambiguous with
 28 regard to “specific”. Accordingly, he had no way to comply because he did not want to be

1 disciplined. However, as he conceded in the paragraph above, he had “filed his grievance
2 protesting the delay in his receiving medical are (sic)”. Response at 6. He was just untimely
3 in his filing, therefore failing to properly exhaust his remedies. His argument fails, as he
4 cannot simultaneously argue that he properly filed a grievance, but risked retaliation if he
5 had filed a grievance because the AR is too ambiguous, he did not understand the AR and
6 was scared to file a grievance.

7 | C. Defendants Should Not be Sanctioned

8 Carter asks for sanctions, stating that Defendants have “merely “repeat[ed]
9 arguments made in the underlying motion already rejected by the Court.”² Carter refers
10 this Court to LR 59-1(b), “A movant who repeats arguments will be subject to appropriate
11 sanctions”, as giving this Court the proper grounds for sanctions. As discussed in
12 Defendants’ Motion, and *infra*, Defendants have properly brought the instant Motion under
13 LR 59-1(a)—clear error in a decision. Defendants have not “merely repeat[ed]” their
14 arguments from their underlying motion. Accordingly, sanctions are not appropriate or
15 warranted.

16 | III. CONCLUSION

17 Defendants' Motion should be granted because this Court clearly erred in finding
18 that Carter exhausted his administrative remedies regarding his First Amendment
19 retaliation claims against Dr. Bitar and Bean. Defendants' Motion is procedurally proper
20 and, substantively, Carter did not pursue his grievances to the second level as required by
21 AR 740, nor was it timely submitted. Accordingly, reconsideration is appropriate.

22 || DATED this 12th day of April, 2021.

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²⁸ Carter asked that the “Plaintiffs” be sanctioned, but it will be presumed that this is an error and he meant the “Defendants”. Response at 7.

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on April 12, 2021, I electronically filed the foregoing **DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR PARTIAL RECONSIDERATION OF ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**, via this Court's electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by mailing a copy to the following:

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/s/ Amy A. Porray
Amy A. Porray, an employee of the
Office of the Nevada Attorney General